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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. ~~1-835-1~~

GAS LIGHT COMPANY OF COLUMBUS, *Petitioner*

vs.

GEORGIA POWER COMPANY and
THE SOUTHERN COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit

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Petitioner Gas Light Company of Columbus prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit (Court of Appeal No. 30,091), entered in the above-entitled case on March 23, 1971.

OPINIONS OF THF COURTS BELOW

The judgment and opinion of the United States District Court for the Middle District of Georgia (Columbus Division) of June 6, 1970, dismissing substantially all of plaintiff-petitioner's antitrust claims and granting defendant-respondents' motion for partial summary judgment as to those antitrust claims is reported at 313 F. Supp. 860 (M.D. Ga. 1970). A copy of that judgment and opinion is set forth in Appendix A to this petition, *infra.*

Petitioner appealed the adverse decision to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §1291. That Court affirmed the judgment of the District Court dismissing the petitioner's antitrust claims. The opinion of the Court of Appeals is reported at 1971 CCH Trade Reg. Reporter ¶73,522, page 90,117, and is also set forth as Appendix B to this petition, *infra.*

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 23, 1971 (see Appendix B). Neither a rehearing nor an extension of time was sought or granted. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

This case presents the extremely important question of the extent to which the federal antitrust laws are

interdicted or effectively repealed by state regulatory agencies. As such, this case presents questions of great significance regarding the national economic policy favoring vigorous enforcement of the federal antitrust laws; particularly, whether the so-called "state-action immunity" recognized in *Parker v. Brown*, 317 U.S. 341 (1943) should be confined within its originally intended limits, or whether that immunity should be expanded to except virtually all state regulated businesses from the application of the antitrust laws. Specifically the questions raised in our present case are:

(1) Whether, under *Parker v. Brown*, supra, voluntary business practices undertaken by an electrical utility corporation which would violate the federal antitrust laws to the detriment of a competing supplier of natural gas are immunized merely because such practices are the subject of an order by the Georgia Public Service Commission, even though (a) the State of Georgia has a long-standing policy favoring vigorous, open and fair competition between suppliers of electricity and suppliers of natural gas and (b) there was no showing whatever that the Commission's orders were intended to interdict such competition?

(2) Whether the Courts below erroneously extended the doctrine of "primary jurisdiction" by granting antitrust immunity as to any business practice or conduct approved or "ordered" by such an agency irrespective of its anticompetitive purpose or effect?

STATUTES INVOLVED

1. The Sherman Act, Section 1 (15 U.S.C. §1) provides in relevant part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

2. The Sherman Act, Section 2 (15 U.S.C. §2) provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

3. The Clayton Act, Section 3 (15 U.S.C. §14) provides:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities, of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

4. The Clayton Act, Section 4 (15 U.S.C. §15) provides:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

(A) The Nature of the Case.

The present case arises out of a private antitrust suit filed by petitioner Gas Light Company of Columbus (hereinafter "Columbus Gas Light" or "petitioner") pursuant to Section 4 of the Clayton Act (15 U.S.C. §15) against respondents Georgia Power Company (hereinafter "Georgia Power") and The Southern Company (hereinafter "Southern"). Petitioner, in its complaint (See Appendix[1], pages 1-10), sought to recover damages which it had sustained as a result of the respondents' alleged violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2) and Section 3 of the Clayton Act (15 U.S.C. §14).

Petitioner is an investor-owned public service corporation which is primarily engaged in the distribution of natural gas as a form of energy serving the City of

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[1]References are to the Single Appendix filed in the United States Court of Appeals for the Fifth Circuit, which in fact comprised the entire record on appeal. Therefore, hereinafter, citations to the Appendix will be as follows: "(R.....)"

Columbus, Muscogee County, and Fort Benning, Georgia. Respondent Georgia Power is an investor-owned utility corporation engaged in the generation, transmission, distribution and sale of electrical energy in substantially all of the State of Georgia. Respondent Southern is a holding company which owns substantially all of the stock in defendant Georgia Power. (R. 2-3.)

Georgia Power is in competition with Columbus Gas Light in the sale of energy within the geographical area served by the petitioner. (R. 5.) In its complaint, Columbus Gas Light alleged that the respondent, particularly Georgia Power, entered into unlawful combinations and conspiracies to monopolize the market for energy and to restrain trade and commerce therein with the objective of and intent to suppress and eliminate competition of natural gas companies such as petitioner. (R. 6.)

(B) Course of Proceedings and Disposition in the Courts Below.

This case was filed by petitioner on or about January 13, 1969. (R. 1.) Subsequently, respondents made a motion for summary judgment urging that (1) interstate commerce was not sufficiently involved to support jurisdiction under the federal antitrust laws; and (2) the activities of the respondents which formed the basis for the complaint were regulated by the Georgia Public Service Commission and therefore immune or excluded from the scope of the federal antitrust laws. (R. 78, *et seq.)*

After briefing and oral argument, the United States District Court for the Middle District of Georgia granted respondents' motion for summary judgment as to nearly all of petitioner's antitrust claims. (See Order and Opin-

ion of the Court. R. 256, also pp. 227, *et seq.)* The Court did not rule on respondents' contentions with respect to the interstate commerce question. (R. 229.) The Court ruled that the anticompetitive practices of respondents which were regulated by the Georgia Public Service Commission were immune from the federal antitrust laws. The District Court also ruled—as to one of petitioner's claims, that of an alleged tying arrangement—that underground wiring was not a product separate and distinct from the electricity for purposes of Section 3 of the Clayton Act. (R. 254-255.)

On June 6, 1970, the District Court, in accordance with its order and opinion, entered final judgment pursuant to F.R. Civ. Proc., Rule 54(b) dismissing the complaint and denying all relief requested therein with the exception of the claim set forth in subparagraph 12(f) thereof. (R. 259-260.) Columbus Gas Light filed its Notice of Appeal on June 15, 1970. (R. 261.) The jurisdiction of the United States Court of Appeals for the Fifth Circuit was invoked pursuant to 28 U.S.C. §1291.

In its decision, affirming the ruling of the District Court, the Fifth Circuit Court ruled that:

(1) The Georgia Public Service Commission had the power to regulate the rates and practices of public utilities in the State of Georgia;

(2) The anticompetitive rates and practices here complained of were the subject matter of regulations by that Commission, and

(3) "Though the rates and practices originated with the regulated utility, Georgia Power, the facts make it plain that they emerged from the Commission

as products of the Commission. They are thus immune from the operation of the antitrust laws under the *Parker* exemption." (Appendix B, p. xxxv.)

(C) Statement of Facts.

All of the parties in the present case entered into a stipulation for purposes of the motion for summary judgment. This stipulation (R. 29-78) sets forth the relevant facts and contentions of the parties with respect to the interstate commerce issue as well as the present controversy concerning the alleged immunity of respondents' practices from the antitrust laws. This stipulation and the facts found by the District Court will be briefly summarized.

Petitioner is engaged in the business of distributing and selling natural gas as a form of energy to consumers in the area of the City of Columbus, Muscogee County, and Fort Benning, Georgia. Respondent Georgia Power is engaged in the business of distributing and selling electricity as a form of energy to consumers in this same geographical area (as well as other portions of the State of Georgia). Thus, within petitioner's area of operation, it is in substantial competition with Georgia Power in the sale of energy to consumers. (R. 228.)

It was established in the District Court that, with respect to some uses of electricity, defendant Georgia Power has an absolute monopoly (or "captive load") and encounters no competition from petitioner in that no form of energy other than electricity can be utilized. (For example, only electric power can be used for illumination or for operation of most of the smaller household appli-

ances such as television sets, mixers, irons, automatic can openers, toothbrushes, radios, clocks, electric shavers, *etc.*) Indeed, it should be noted that electricity is essential for the operation of motors used in gas appliances. (R. 117.)

As to other uses of electricity, natural gas is a competitive form of energy. Thus Columbus Gas Light and Georgia Power are in direct competition in serving consumer needs for space heating, water heating, air conditioning, cooking, refrigerating, and clothes drying. (R. 117.)

Petitioner contends that respondents engaged in various monopolistic anticompetitive practices and that they combined with each other and with additional co-conspirators to suppress or eliminate the competition from suppliers of natural gas including petitioner, by various predatory means. Pursuant to this plan, it is alleged that respondents engaged in the following anticompetitive practices. (See R. 33-34):

(a) They adopted and implemented rate schedule B-10-B, which petitioner contends is preferential because the "qualifying load" consists of usages in which natural gas is competitive with electricity; petitioner further contends that said rate schedule permits respondent Georgia Power to sell electricity for such competitive uses at less than its incremental cost;

(b) They adopted and implemented an Underground Residential Distribution Wiring Plan which petitioner contends constitutes a means by which Georgia Power "bribes" general contractors to construct totally electric subdivisions and/or apartments;

(c) They adopted and implemented a Residential Wiring Plan, Rule G, which petitioner contends is another means of "bribing" builders to go "totally electric" in single family residences and apartments;

(d) They adopted and implemented Rate Schedule TE-2, the "budget billing" feature of which, petitioner contends, has been misrepresented and misinterpreted to constitute a guaranteed flat charge for electricity; and

(e) They used restrictive covenants in land deeds, which covenants require that any building or dwelling erected on the deeded property be "total" electric.

Under Georgia Law, regulation of the rates and services of public utilities, which includes respondent Georgia Power, is vested in the Georgia Public Service Commission and Georgia Power is obligated by law to comply with orders of the Georgia Public Service Commission as to rates and services. All of the matters complained of below by petitioner, with the exception of (e) above, are subject to regulation by the Georgia Public Service Commission, and have been the subject of extensive hearings before said Commission on complaints of Columbus Gas Light, Atlantic Gas Light Company, and others. (R. 34-39.) These matters were initially presented to the Commission by respondent Georgia Power seeking approval of their proposed activities. As to some of these, the Georgia Public Service Commission approved Georgia Power's requests as submitted. In other instances the Commission disallowed the original plan as presented by Georgia Power and "ordered" respondent to adopt and comply with a related plan substituted by the Commis-

sioner. (R. 234-235.) However, even in these latter instances, the rates or plans substituted by the Commission included the anticompetitive practices originally proposed by respondent and which are the subject matter of this antitrust suit. (R. 44-71.)

REASONS FOR GRANTING THE WRIT

I. THERE EXISTS SHARPLY DIVIDED AND IRRECONCILABLE DECISIONS IN NUMEROUS CIRCUITS ON THE SCOPE OF THE PARKER v. BROWN IMMUNITY.

Since 1970 five Courts of Appeal in four circuits have been confronted with immunity defenses under the doctrine of *Parker v. Brown.* These Courts have hopelessly and irreconcilably divided on the scope of the antitrust immunity conferred by *Parker.* The cases, chronologically by date of decision are: *G. R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,* 424 F.2d 25 (1st Cir. 1970); *Woods Exploration & Producing Co. Inc. v. Aluminum Company of America,* 438 F.2d 1286 (5th Cir. 1971) (January 5, 1971); *Washington Gas Light Co. v. Virginia Electric and Power Co.,* 438 F.2d 248 (4th Cir. 1971) (Feb. 12, 1971); *Gas Light Co. of Columbus v. Georgia Power Co.,* ..... F.2d ..... (5th Cir. 1971) (March 23, 1971) and *Hecht v. Pro-Football, Inc.,* ..... F.2d ..... (D.C. Cir. 1971) (April 27, 1971).

The controlling issue in each of these cases was whether approval of private anticompetitive activity by an agency of the state immunizes the private conduct from antitrust sanctions and remedies.

In *G. R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970), the First Circuit Court of Appeals narrowly and rigidly construed the nature of the immunity from antitrust sanctions articulated in *Parker*. The Court ruled that a public agency's adoption of defendant's exclusionary specifications was accomplished by means of predatory and anticompetitive practices on the part of that defendant, and no immunity from the antitrust laws was applicable under *Parker v. Brown* notwithstanding the approval of the defendant's anticompetitive plan and practices by the state agency there involved. The Court, in *Whitten*, recognized that the *Parker v. Brown* immunity arises *only* when the state legislature makes a determination that certain particular aspects of free competition are not in the public interest and, therefore, it *commands* that specific otherwise anticompetitive practices be pursued. (424 F.2d at p. 30.)

In *Woods*, the Fifth Circuit (with a panel completely different than that in our present case) adopted an enlightened approach to this complex problem. Judge Goldberg's carefully reasoned analysis of the *Parker v. Brown* issue began by rejection of the argument "that because of extensive regulation the oil and gas industry is not susceptible to the strictures of the antitrust laws." (438 F.2d at 1302.) Judge Goldberg adopted the view that:

> "state regulation does not mean that there is no room for antitrust policies to operate. Our antitrust laws constitute our economic magna carta, designed to protect against predatory oppression. Conceived as such a writ they must not be facilely negated. . . . We therefore think it incumbent upon this court to render both state regulatory and federal antitrust

> goals complementary rather than mutually exclusive." (438 F.2d at 1302.)

At complete odds with this reasoned approach is the sweeping repeal of antitrust as applied to any state-regulated agency announced by the Fourth Circuit in the *Washington Gas Light* case. And closely following that decision, and based largely on its reasoning, the panel of the Fifth Circuit which decided this present case read *Parker v. Brown* as conferring antitrust immunity as to any practices by private businesses which are the subject matter of an order by a state regulatory agency. The necessary effect of the ruling below then is to grant immunity from the antitrust laws as to any private business activity which has been approved by a state commission. As the Court below stated:

> "Though the rates and practices originated with the regulated utility, Georgia Power, the facts make it plain that they emerged from the Commission as products of the Commission. They are thus immune from the operation of the antitrust laws under the *Parker* exemption." (Opinion, Appendix B, *infra.*)

In *Hecht v. Pro-Football, Inc., supra,* the Court of Appeals for the District of Columbia developed a slightly different interpretation of the immunity problem. There the conflict was between two allegedly inconsistent *federal* policies: the antitrust laws and legislation dealing with a sports stadium within the District. Recognizing that the problem was similar to *Parker v. Brown* the Court acknowledged the wisdom of Judge Goldberg's approach in *Woods* while implying that Judge Bell's treatment below of the controversy herein gave undue weight "to the

sheer existence of state action" and did not "attempt to reconcile antitrust and regulatory policies". (___ F.2d ____.) Moreover, the *Hecht* Court articulated more clearly than any Court before it, that the decision in *Parker v. Brown* involved "regulatory action in the state's capacity as sovereign, and it involves sovereign state regulatory action which is consistent with federal national policy, the Agricultural Adjustment Act, enunciated by the national Congress, which is also the source of the federal antitrust policy." In short, the anticompetitive plan adopted by the Calfornia legislature in *Parker* was not at odds with Congress' own policies insulating agricultural activities from free market forces in order to avoid disastrous economic consequences in that industry.

Viewed in its setting, *Parker v. Brown*, as we shall demonstrate, provided only the narrowest immunity from the antitrust laws. Unless reversed by this Court the sweeping exemption announced below, then, will open the door for a myriad of state regulatory agencies, commissions and boards supervising various industries in 50 different states, to substitute their own standards in place of antitrust remedies in the regulation of trade and commerce affecting national interests and policies. Surely this Court could not have intended such a result by its pronouncement in *Parker v. Brown*.

II. THE RULINGS OF THE COURTS BELOW IMPROPERLY EXPAND THE IMMUNITY AS RECOGNIZED IN PARKER v. BROWN AND ERRONEOUSLY INSULATE THE ANTI-COMPETITIVE BUSINESS PRACTICES OF REGULATED INDUSTRIES FROM THE SCOPE OF FEDERAL ANTITRUST LAWS.

This case presents an issue of great significance regarding the general application of federal antitrust rules and policies. As stated above, the question is one over which much confusion has recently developed in lower federal courts throughout the nation:[2] to what extent do the federal antitrust laws apply to anticompetitive business practices within the so-called regulated industries, particularly as to those private businesses whose activities are regulated by state administrative agencies or commissions.

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[2]See, for example, the analysis of the recent cases discussed above, including the decision of the Fifth Circuit below in BNA Antitrust & Trade Regulation Report (No. 514), May 25, 1971, p. B-1. The analysis states (at p. B-2):

> "Some observers are doubtful about the reasoning in these cases, especially VEPCO, where silence was construed as approval of the promotions even though the regulatory commission ultimately prohibited such practices. These observers question whether such privately initiated practices are properly "state action" within the meaning of the *Parker v. Brown* doctrine. They suggest that where the state regulatory scheme contemplates some competition, as here, between gas companies and electric companies, the antitrust laws may be held to apply."

And concludes (at p. B-4):

> "Some observers hold the same view as the D.C. Circuit in thinking that *Parker v. Brown* should be reconsidered in light of its particular facts, *i.e.*, that state regulation pursuant to an over-all federal regulatory scheme was involved. Accordingly, they think that the scope of exempted 'state action' will be more strictly limited and that antitrust will play a more important role in this area than that which would be allowed by the decisions of the Fourth and Fifth Circuits."

This Court is here urged to correct the recent erroneous interpretations of the *Parker v. Brown* doctrine as typified by the ruling below, and to reinstate and re-apply federal antitrust laws and policies to the operations of these numerous multi-billion dollar private "regulated" businesses and their predatory and anticompetitive practices. For, as will be demonstrated herein, the decision of the Fifth Circuit Court below—in expanding and enlarging the antitrust immunity—not only undermines the national policy of open competition and fundamental "economic liberty" which the antitrust laws were designed to advance, *Northern Pacific Ry. Co. v. United States,* 356 U.S. 1, 4 (1958), but it ignores the limited nature of the *Parker* case itself.

To properly interpret the *Parker v. Brown* ruling, it is necessary to examine the policy which guided this Court in its recognition of the so-called "state action" immunity from federal antitrust laws. In *Parker* the Court recognized that in limited instances and under rare and extreme circumstances, a state legislature may make a deliberate and conscious decision directing private business entities to engage in anticompetitive conduct which would contravene the principles of free and open competition demanded by federal antitrust laws. In these instances, the state itself has determined that some important local public interest would be seriously impaired by the very type of open competition which that state now specifically prohibits.

In *Parker v. Brown,* the State of California had made a legislative policy determination that its important raisin industry could not survive under the traditional rules of

free and open competition. The legislature made the judgment that a marketing proration plan was necessary. Thus, the state, through its legislature, decided to limit competition in the raisin industry in certain respects.[3] This Court's description of the precise "state action" there present is particularly relevant:

> "The California Agricultural Prorate Act authorizes the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, *so as to restrict competition among the growers and maintain prices in the distribution of their commodities* to packers. The declared purpose of the Act is to 'conserve the agricultural wealth of the State' and to 'prevent economic waste in the marketing of agriculture crops' of the state." 317 U.S. at p. 346. (Emphasis added.)

The Act also created an administrative Commission to carry out the details and supervise the enforcement of the prorate plan. Thus, in *Parker* the plaintiff was challenging the essence of the marketing program which the state legislature had established. In *Parker* the plaintiff was demanding free and open competition of the type which the legislature had expressly suspended. Had the plaintiff prevailed in *Parker,* the entire state prorate marketing program would have fallen. Indeed such was precisely the relief sought in that case. 317 U.S. at p. 344.

Our case is clearly distinguishable from *Parker v. Brown.* Petitioner Columbus Gas Light is not challenging

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[3]It should be noted that in *Parker,* this Court recognized that the California Raisin Prorate Program was consistent with federal policies within the agricultural industry. 317 U.S. at pp. 352-358.

the basic articulated policies which prompted the State of Georgia to create its Public Service Commission; nor is petitioner challenging the authority of the Commission to operate as prescribed by Georgia law. Petitioner Columbus Gas Light urges this Court to recognize that the State of Georgia has *not* made a legislative determination in any way analogous to that embodied in the California Prorate Act which would immunize the private defendants in our case from the operation of the federal antitrust laws.

It is true that in the creation of the Public Service Commission, the State of Georgia has abolished some of the competitive considerations which would otherwise be applicable to public utilties such as electric power and natural gas suppliers. For example, in creating such franchised monopolies, the State has made the legislative judgment that only one supplier of electricity and one supplier of natural gas shall serve any given geographic area within the state. Therefore, by command of the State, there can be no competition among suppliers of electricity for the consumers' business. If a resident of Columbus, Georgia desires electricity, he must purchase it from respondent Georgia Power. He has no other alternative. Under normal rules of free and open competition, the agreement between Georgia Power, the State of Georgia and others to so allocate geographic markets would constitute a *per se* violation of the antitrust laws. *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967).

But under *Parker v. Brown* such a division of markets is valid because done at the command of the State which

has previously made a deliberate prudential judgment that free and open competition in the supply of electricity would not be in the best interests of the public. The State has thus created a monopoly and established the Public Service Commission to supervise and regulate certain activities therein to insure that the public utilities do not abuse the monopolistic power which they have been given. As such, the Commission's primary duty is to protect the consumers from unreasonably high rates and unjust discrimination. Georgia Code §93-309; Georgia Public Service Comm. Laws and Rules, p. 9.

Thus, if in this case petitioner was a competitive supplier of electricity seeking to enjoin the agreement between defendant Georgia Power and the State of Georgia as a monopolistic and illegal division of markets, then the *Parker v. Brown* immunity would apply. For in such a proceeding, the petitioner would be challenging the very heart of the program of franchised public utilities which the State has purposefully and deliberately established for the benefit of its citizens. But our present case is patently different from the hypothetical proceeding described above.

Petitioner Columbus Gas Light is a supplier of natural gas. In its area of operation it competes with respondent Georgia Power. This competition between the two utilities is authorized and sanctioned by the State. Unlike the situation in *Parker v. Brown,* there is no indication here that the State of Georgia disapproves of or wishes to suspend the traditional considerations of fair, free and open competition between natural gas and electricity as competing forms of energy for Georgia consumers. In

fact, all indications are that fair, free and open competition between suppliers of energy such as Columbus Gas Light and Georgia Power is officially favored and encouraged by the State of Georgia.

For example, Article IV, Section 4(3) of the Georgia Constitution which creates the Public Service Commission provides:

> "There shall be a Public Service Commission for the regulation of utilities, vested with the jurisdiction, powers and duties now provided by law or that may hereafter be prescribed by the General Assembly, *not inconsistent with other provisions of this Constitution.* . . ." (Emphasis added.)

The enabling provision which created the Commission must therefore be read with the constitutional language of Article IV, Section 4(1):

> "All contracts and agreements which may have the effect, or be intended to have the effect, to defeat or lessen competition, or to encourage monopoly, shall be illegal and void. The General Assembly of this State shall have no power to authorize any such contract or agreement."

To prove beyond doubt that the State of Georgia did not intend to confer antitrust immunity on the activities of the respondents here challenged, one need only peruse other constitutional, legislative and administrative provisions which prohibit unreasonable rates or charges, rebates, unjust discriminations and deceptive practices. Georgia Const., Art. IV, Section 1(1) and (2); Georgia Code §93-309 and 310; Georgia Publ. Serv. Comm., General Rules, Rule 2. See also: *Re Electric Light & Power*

Rates, Practices and Services in Savannah, Ga., 1917E P.U.R. 46 (1917).

Whereas in *Parker,* the operation of the federal antitrust laws would have frustrated and destroyed the California raisin marketing program, the application of antitrust policy to the alleged activities of the respondents herein would be consistent with the public utility laws of the State of Georgia. There can, therefore, be no justification for the decision of the Fifth Circuit Court of Appeals, below, immunizing the respondents' conduct under *Parker v. Brown.*

The mere fact that the respondents' plans and programs were approved by the Public Service Commission is insufficient to confer antitrust immunity. As stated above, under Georgia law the Commission is primarily concerned with the relationship between a specific utility and the consumers which it serves. The Commission is not authorized to suspend the rules of fair competition as between electrical and natural gas suppliers; nor can we assume that, by its orders, the Commission intended or could have accomplished such a result. As this Court recognized in *Parker v. Brown,* 317 U.S. at p. 351,

> ". . . a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ."

In holding that the practices of Georgia Power Company are the "products of the Commission" and therefore state activity not subject to antitrust regulation, the Fifth Circuit has given significance and dimension to the Commission's action totally unwarranted by Georgia law. In *Georgia Power Co. v. Georgia Public Service*

Commission, 211 Ga. 223, 229, 85 S.E. 2d 14, 19 (1954), the Supreme Court of Georgia stated:

> "The Commissioners are not the managers of this company, but their function is to regulate and disapprove any dishonest or clearly inefficient conduct and practice by the utility. Georgia Public Service Comm. v. A. & W.P.R. Co., 164 Ga. 822 [139 S.E. 725]; Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission [262 U.S. 276, 43 Sup. Ct. 544, 67 L.ed. 247, 42 A.L.R. 1232]; Chicago M. & St. P. Ry. Co. v. Wisconsin, 238 U.S. 491 (35 Sup. Ct. 869, 59 L.ed. 1423, L.R.A. (1916A) 1133); Banton v. Belt Line Ry., 268 U.S. 413 (45 Sup. Ct. 534, 69 L.ed. 1020)."

In addition, it is extremely important to emphasize the minimal nature of Commission action which constitutes approval of a utility's rates or practices. Indeed non-action by the Commission will have this effect. *Columbia Baking Co. v. Atlanta Gas Light Co.,* 78 Ga. App. 241, 50 SE 2d 382 (1948).

In view of the State constitutional provisions quoted above and the rulings by the Georgia courts, it is startling indeed for the contention to be made that the Georgia legislature has expressly or by fair implication empowered the Commission to eliminate principles of competition between the electric utilities on the one hand, and gas utilities and competing fuel suppliers on the other. In *Re: Electric Light & Power Rates, Practices and Services in Savannah, Ga., supra,* an early proceeding under the identical legislative authority, the Commission itself stated, relying on that constitutional provision which prohibits the legislature from enacting

legislation designed to defeat or lessen competition (then codified as §6466 of the Georgia Code):

> "This constitutional provision (Code, §6466) had in view the encouragement and fostering of competition in its fullest sense, and expressly forbade the legislature from authorizing any transactions between corporations which would defeat or lessen competition. The anticipated benefits of competition could only be reflected in rates and services. Having safeguarded the public against unreasonable and unjustly high rates, the framers of the Constitution evidently had in mind the securing for the public the lowest rates and best service that competition might bring about. *The constitutional framers were evidently distrustful of even regulated monopoly.*" (1917E P.U.R. at 726). (Emphasis added.)

There is nothing in Georgia law which requires an electric utility to file a residential wiring plan, or a rate schedule for customers with "qualifying loads" (B-10-B) or a separate rate schedule for total electric residential customers (TE-2) or any of the practices in question in this antitrust action. The variety and range of practices or policies which the Commission might find to be within the limits of managerial discretion is quite broad. A finding by the Commission that particular practices are within the prerogatives of management is in no sense a directive by the Commission to Georgia Power to institute and implement such practices in violation of the principles of fair competition.

The Fifth Circuit below, relying heavily on the recent Fourth Circuit decision, *Washington Gas Light Co. v. Virginia Electricity & Power Co., supra,* ignored all of

these pertinent policy considerations and went on to rule that the mere fact that the predatory practices challenged in this antitrust action were the subject matters of "orders" and approved by the Georgia Public Service Commission, immunized such practices from the antitrust laws. The predatory nature of the respondents' practices are beyond question in this proceeding. Petitioner sought to prove below that respondent Georgia Power utilized its "captive load" monopoly power to induce consumers to purchase electricity for those uses in which natural gas is a competitive form of energy. In effect, respondent is abusing the legal monopoly it enjoys in "captive load" uses to penalize and discourage consumers from using natural gas even though, if a free choice was possible, such consumers would prefer natural gas for some of the competitive uses (e.g., space heating, cooking, *etc.*). Compare: *United States v. Griffith,* 334 U.S. 100 (1948).

As to respondents' underground wiring and residential wiring plans, it is clear that respondent Georgia Power illegally combines and conspires with the developers of new subdivisions providing the latter a credit against the cost of the underground installation. The credit is calculated in a manner which makes it profitable for the developer to insure that all homes being constructed will utilize electricity rather than natural gas as a source of energy for such uses as space heating. These new subdivisions have come to be known as "totally electric" meaning that electricity is the sole source of energy in each home therein. This has been achieved through certain predatory practices pursued by the respondents in conjunction with the developers and their salesmen. These

wiring plans operate to deprive the new homeowner of an opportunity to make a choice on the basis of competitive considerations as between electricity and natural gas as a form of energy. These agreements between respondents and the subdivision developers (who are able to effectively control whether natural gas or electricity will be utilized by the prospective residents for space heating, water heating, cooking, air conditioning, clothes drying and refrigeration) resulted in the elimination of petitioner as a competitor of Georgia Power in substantial portions of the total residential market. This Court has consistently condemned such anticompetitive practices. *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495 (1969); *Northern Pacific Ry. Co. v. United States, supra.*

It is clear that many consumers would and do prefer natural gas to electricity as a form of energy, especially for cooking and space and water heating. Nevertheless in our present case, the builders of new residential developments have been and continue to be coerced and induced by respondent's practices to preclude themselves and the home buyers from utilizing natural gas for these purposes.

The underground wiring and residential wiring plans are especially insidious because, under their terms, allowances are paid directly to the builder whose primary concern is the cost of construction, not the cost of operation. In the builders' interest in obtaining an immediate allowance, the consumer's choice between natural gas and electric energy is frustrated. Considerations of competitive choice in a free market are not permitted to come into play. Respondents utilize the monopoly power they

enjoy as to some uses of energy to improperly eliminate petitioner Columbus Gas Light from a substantial portion of the market in violation of the antitrust laws. *United States v. Griffith, supra; Northern Pacific Ry. Co. v. United States, supra; Fortner Enterprises v. United Steel Corp., supra.*

It is quite clear that the respondents' activities here in question are or, at least, could be found to be anticompetitive and predatory in their design to eliminate the competition of natural gas suppliers. The Courts below, however, held respondents' practices to be immune from antitrust sanctions and remedies under *Parker v. Brown, supra,* notwithstanding these considerations. But it is clear that the Supreme Court, in *Parker,* did not intend by its decision to exclude from the federal antitrust laws *all* state approved activities conducted by private parties. However, the Court's rulings below, if accepted, would provide antitrust immunity to *all* industries which are regulated by state agencies. Such a result is not sanctioned by *Parker v. Brown.* Indeed, many Supreme Court decisions have rejected this argument under circumstances similar to our present case. "The regulated industries are not *per se* exempt from the Sherman Act." *Georgia v. Pennsylvania R.R.,* 324 U.S. 439, 456 (1945). More recently, the Court has stated:

> "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust laws and regulatory provisions." *Carnation Co. v. Pacific Westbound Conf.,* 383 U.S. 213, 217-218 (1966), quoting from *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 350-351 (1963).

In *Parker*, the Court observed that the prorate program

> ". . . was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the *legislative command* of the state and *was not intended to operate or become effective without that command.* We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to *restrain a state* or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, *an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.*" 317 U.S. at 350-1. (Emphasis added.)

There are many differences between our case and *Parker*. In the present action, petitioner is alleging that various *private* parties (suppliers of electricity) have combined and conspired in a plan designed to eliminate competitors (natural gas suppliers) from the market, or, at least, to suppress and reduce that competition through unfair and predatory practices in restraint of trade. (R. 3, 6.) Neither the Georgia Public Service Commission, nor any other state agency has approved of such a combination. So, even if such approval could immunize private conduct, which we deny, none was given as to those alleged activities. *Wainwright v. National Dairy Products Corp.*, 304 F.Supp. 567 (N.D. Ga. 1969).

Moreover, in our case, Columbus Gas Light is not attempting to restrain the state or its officers. Unlike the situation in the *Parker* case, our petitioner has not sued

or alleged any wrongdoing as against officials of the State of Georgia. Nor is there any attempt here to nullify the state's control over its officers.

But the most striking and, indeed, decisive difference between our case and *Parker* is that here the requested application of the antitrust laws to the challenged practices are *consistent* with Georgia policy favoring competition between natural gas and electrical utilities, whereas in *Parker*, the application of the antitrust laws would have frustrated both the California and national agriculture policies.

Clearly, *Parker v. Brown* does not confer antitrust immunity on all private business practices which are carried on under color of state action as the concept has been defined under the Fourteenth Amendment to the Constitution of the United States. An immunity of that nature would implicitly, but effectively, abrogate the antitrust laws. Thus, under the policy objectives of *Parker v. Brown*, a more specific question must be posed: would the application of the antitrust laws to the particular conduct of the respondents here involved do violence to the policies of the State of Georgia? The answer is, clearly, "no". Indeed, as demonstrated above the application of federal antitrust remedies as here sought to the practices here challenged would be most consistent with the policies of the State of Georgia.

One of the most enlightened lower federal court decisions interpreting *Parker v. Brown* is *Travelers Insurance Co. v. Blue Cross of Western Pennsylvania*, 298 F.Supp. 1109, 1111-1112 (D.Pa. 1969). Holding *Parker* ineffective to bar the action before it, the Court reasoned that the

extensive state regulation of the defendant did not constitute the type of "state action" which conferred antitrust immunity.

> "An analysis of the cases cited by both parties reveals that where a 'state action' exclusion from the scope of the Sherman Act has been sanctioned by the courts, a particular pattern emerges from the statute under which such action is taken. Not only does the legislature create the entity involved or endow it with governmental character, but *it also directs and authorizes that entity by means of the same statute to utilize anticompetitive means to achieve a specific governmental purpose.* For example, in *Parker v. Brown* . . . the California legislature not only created prorate raisin districts *but authorized them to limit production artificially* in order to correct adverse market conditions. Such behavior, if manifested without government direction, would be contrary to federal antitrust legislation. Similarly, in *Allstate Insurance Co. v. Lanier,* 242 F.Supp. 73, 361 F.2d 870 (4 Cir. 1966), a case upon which Defendant relies heavily as authority for its motion, the statute not only created the North Carolina Automobile Rate Administrative Office and provided for its regulation by the state insurance commissioner *but also expressly authorized price-fixing,* an activity proscribed under antitrust laws, in order to protect the people of North Carolina from excessive premiums. In *E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority,* 362 F.2d 52 (1 Cir. 1966) the Massachusetts legislature not only created the Massachusetts Port Authority, *but also endowed it with certain sovereign powers* (such as eminent domain) *and enabled the Authority to operate the Boston Airport as a monopoly.* On the other hand, no case cited by the parties nor discoverable

> through extensive research reveals any authority ascribing 'state action' immunity either to a private entity or to the transactions of a state agency which were *not mandated or directed by legislative enactment*. That regulation and supervision alone do not constitute a delegation of governmental authority is well established. *United States v. Utah Pharmaceutical Association*, 201 F.Supp. 29 (1962) . . . . Further, the Pennsylvania Non-Profit Hospital Plan Act is completely silent in matters that have to do with restraint of trade." (Emphasis added.)

See also *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *Ashville Tobacco Board of Trade, Inc. v. FTC*, 263 F.2d 502 (4th Cir. 1959). And, in *Knuth v. Erie-Crawford Dairy Cooperative Association*, 395 F.2d 420 (3rd Cir. 1968), the Third Circuit Court of Appeals refused to consider a defendant immune from antitrust claims observing:

> "But it does not matter whether the practice was legal or illegal under state law if it was prohibited action under the Sherman Act. Certainly, it is not suggested that the rebate practice is required by state law. *Parker v. Brown* . . . ." (395 F.2d at 424.)

Even the cases relied upon by the Fifth Circuit Court below fail to support their enlargement of the *Parker v. Brown* immunity. In each of those cases, the immunity from antitrust sanctions was granted only because—as in *Parker* itself —the operation of free and open competition would have vitiated the important local interest which the states were attempting to advance. See, for example, *Allstate Ins. Co. v. Lanier*, 242 F.Supp. 73 (E.D. N. Car. 1965), aff'd 361 F.2d 870 (4th Cir. 1966), in which the

state legislature suspended some of the traditional notions of free competition in the insurance industry as a conscious and deliberate act on the grounds that competitive rate setting would not be in the public interest. In *Allstate,* as in *Parker,* the plaintiffs alleged that the state-established plan violated the federal antitrust laws. In both cases, suit was brought against public officials. And most importantly, in both cases had the plaintiff prevailed the entire state-established program would have fallen. A ruling for plaintiffs in *Parker* and *Allstate* would have required the federal courts to construe the antitrust laws to prohibit the states involved from suspending some aspects of free and open competition even though the respective *state legislatures had determined that open competition of the type plaintiffs there sought to pursue* would be harmful to the public interest.

In our present case, the Georgia legislature has given no specific mandate to the Public Service Commission directing or empowering it to order practices in restraint of trade and in violation of the federal antitrust laws; no direct authorization is given the Commission to order tying arrangements, discriminatory discounts and rebates, or the monopolization of the energy market, all of which practices respondents are allegedly pursuing in violation of the antitrust laws. Indeed the mandates contained in the Georgia Constitution and statutes cited above prohibit discriminatory rebates and encourage policies of free and fair competition within the context of the franchise monopolies granted.

Thus, this Court must grant certiorari herein in order to determine the future application of the *Parker v.*

Brown immunity, and the extent to which the federal antitrust laws will apply to competitive situations within the so-called regulated industries. Petitioner does not here seek to overturn *Parker v. Brown.* Nor does it seek to have the federal antitrust laws vitiate important local policies the achievement of which require that states expressly prohibit or suspend some principles of open competition. But petitioner urges this Court to recognize that *Parker v. Brown* was never intended to apply to a case such as our present one in which federal antitrust rules and policies are consistent with the objectives of the State in controlling the inter-relationships between two competitive suppliers of energy.

III. THE RULING BELOW ERRONEOUSLY CONVERTS ROUTINE STATE REGULATORY AGENCY APPROVALS INTO GRANTS OF ANTITRUST IMMUNITY AND THUS IMPLICITLY REPEALS THE DOCTRINE OF PRIMARY JURISDICTION.

Under the doctrine of primary jurisdiction, a dispute involved in an antitrust case which arises within a regulated industry and which could create a conflict between the antitrust court and the regulatory agency as to a matter within the agency's expertise, *e.g.*, rates, tariffs, *etc.*, should initially be "litigated" before the administrative agency. The preliminary administrative proceeding is thus available to educate the antitrust Court as to technical or complex industry considerations which may be pertinent. The antitrust Court thus has the benefit of the agency's expertise, but remains free to reach an independent and different conclusion. *Carter v. American Telephone & Telegraph,* 365 F.2d 486 (5th Cir. 1966).

The doctrine of primary jurisdiction is not, however, to be confused with the *Parker v. Brown* immunity. This is where the Court below seriously erred.

The Court of Appeals ruled—in effect—that merely because the dispute concerning respondents' rates and business practices were aired before the Georgia Public Service Commission, and merely because the Commission approved (or, really, failed to disapprove) those practices, that the activities of Georgia Power here challenged are *immune* from antitrust sanctions. That decision evidences a confusion between the concepts of primary jurisdiction and *Parker v. Brown* immunity and—if allowed to stand—would seriously impair and threaten the effectiveness of the future application of federal antitrust laws within any industry which is generally regulated or policed by a state agency. As such, administrative regulation would be substituted for anti-trust protection in all of the regulated industries, including those—as here involved—where competition is allowed and encouraged.

Moreover, the decision of the Fifth Circuit Court below is in serious conflict with the rulings by this Court on identical issues which have arisen in industries regulated by federal agencies. This Court has consistently recognized in cases such as *Carnation v. Pacific Westbound Conf.*, 383 U.S. 213, 218 (1966) and *United States v. Radio Corp. of America*, 358 U.S. 334 (1959) that administrative regulation of such governmentally created quasi-monopolies was not meant to supplant federal antitrust regulation except in those limited instances in which the government has deliberately and expressly prohibited some aspect of open competition thereby immunizing only those

specific private practices. Compare: *Parker v. Brown,* supra, and *United States v. Pan American Airways,* 371 U.S. 296, 305 (1963). No more extensive immunity can or should be articulated by the Courts. Accordingly, in *Carnation v. Pacific Westbound Conf., supra,* the Supreme Court stated:

> "We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render more general provisions of the antitrust laws wholly inapplicable to that industry."
> (383 U.S., at p. 218.)

Pursuant to this principle, this Court has ruled on numerous occasions that the antitrust laws could be applied against defendants in the regulated industries even though the conduct forming the basis of the antitrust claim had been approved by an administrative agency:

(a) *United States v. Radio Corp. of America,* 358 U.S. 334 (1959) (F.C.C. approval was a decision that defendants' conduct would not violate the "public interest, necessity or convenience" and had no bearing on subsequent civil antitrust action.)

(b) *California v. F.P.C.,* 369 U.S. 482 (1962) (F.P.C. approval of a merger did not confer antitrust immunity even though the F.P.C. had taken the competitive factor into account prior to passing upon the merger application.)

(c) *United States v. Philadelphia National Bank,* 374 U.S. 321 (1963) (Bank merger approved in advance by U.S. Comptroller of Currency pursuant to an Act of Congress was held not to immunize such merger from the antitrust laws—even though the Comptroller duly considered the possible anticompetitive effects of the merger.)

(d) *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963) (Action taken by defendant pursuant to grant of authority from the federal Securities Exchange Act was held not immune from federal antitrust laws.)

See also, the same effect: *United States v. Trans-Missouri Freight Assn.,* 166 U.S. 290 314-315, 17 S.Ct. 590 (1897); *United States v. Joint Traffic Ass'n,* 171 U.S 205, 19 S.Ct. 25 (1898); *Northern Securities Co. v. United States,* 193 U.S. 197, 24 S.Ct. 436 (1904); *United States v. Borden Co.,* 308 U.S. 188 (1940); *Georgia v. Pennsylvania R.R. Co., supra; Northern Pacific R.R. Co. v. United States,* 356 U.S. 1, 78 S.Ct. 514 (1958); *Maryland & Va. Milk Producers' Association v. United States,* 362 U.S. 458, 80 S.Ct. 847, 852-4.

In their opinions below, the District Court and Court of Appeals summarily rejected the relevance of these cases because they dealt with *federal* administrative agencies. The Courts failed to recognize that the policies and issues concerned are identical to our present case involving a state regulatory agency. The essential question relates to the extent to which administrative regulation supplants antitrust regulation and under what circumstances such administrative regulation will confer immunity from anti-

trust sanctions. The answer is clear. Immunity is created only in those limited instances where the legislature (state or federal) has found that open competition—as to certain specified practices—is not in the public interest and, therefore, the legislature commands the parties to pursue a specific course of otherwise anticompetitive conduct (*e.g.*, rate setting, division of markets, *etc.*)

In a few rare instances, Congress has specifically and expressly provided that certain types of federal administrative authorization will immunize conduct from antitrust sanctions. *Carnation v. Pacific Westbound Conference, supra; United States v. Pan American Airways,* 371 U.S. 296 (1963). But even here this Court noted that under regulatory schemes such as those supervised by the Federal Maritime Commission, the Civil Aeronautics Board and the Interstate Commerce Commission, grants of Congressional immunity were narrow and the antitrust laws are not completely displaced, 371 U.S. at p. 305. See, for example, the limitation read into the provision of the Civil Aeronautics Act by the Court of Appeals for the Second Circuit in *Transworld Air Lines v. Hughes,* 332 F.2d 602 (2nd Cir. 1964).

Parker v. Brown must be read as permitting the state legislatures to confer a similar immunity, and no more, only where they deem competitive practices to be contrary to the public interest. Simply stated, then, neither the existence of a regulatory administrative agency nor the approval by such an agency of the conduct of respondents herein may operate to immunize that conduct from scrutiny, under the federal antitrust laws. *United States v. Radio Corp. of America,* 358 U.S. 334 (1959).

If antitrust immunity has been consistently rejected in cases involving the federal regulatory agencies, it must be even more emphatically denied where mere state administrative action is involved. It is clear that federal legislation—such as that embodied in the antitrust laws—takes precedence over and pre-empts any conflicting state statute or administrative rule. Such is the command of the "Supremacy Clause" of the United States Constitution, Article VI, Section 2. However, taken to their logical conclusion, the rulings in our present case by the Courts below would permit a state legislative or administrative body to make rules which except certain conduct pursued by private corporations from the federal antitrust laws. It would accord *state* regulatory agencies with powers and authority which has been denied to *federal* regulatory agencies. The very idea that such state regulation could "pre-empt" Congressional legislation and *pro tanto* amend or repeal the national antitrust laws is patently absurd. See, for example, *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 232 (1964). In *United States v. Radio Corp. of America, supra,* after examining the power delegated to the Federal Communications Commission by Congress, the Supreme Court ruled:

> "Thus, the legislative history of the Act reveals that the Commission was not given the power to decide antitrust issues, as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts." (358 U.S. at p. 346)

This Court must grant the petition for Writ of Certiorari here sought by Columbus Gas Light in order to resolve the uncertainty as to the future application of the

antitrust laws created by the confusion on the part of the Court below in equating the doctrine of primary jurisdiction with the limited concept of antitrust immunity recognized in *Parker v. Brown*.

CONCLUSION

For the reasons stated above, the present petition for a Writ of Certiorari should be granted.

Dated, June 14, 1971.

Respectfully submitted,

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(Appendices Follow)

Appendix A

United States District Court,
M. D. Georgia,
Columbus Division.
May 14, 1970.

Civ. A. No. 1338.

Gas Light Company of Columbus,
Plaintiff,
vs.
Georgia Power Company and the Southern Company,
Defendants.

J. ROBERT ELLIOTT, District Judge:

This is an antitrust case brought by Gas Light Company of Columbus, a local distributor of natural gas in the Columbus, Georgia area, against Georgia Power Company, a state-wide electric utility engaged in the sale of electricity in the Columbus area, as well as other places, and against The Southern Company, a public utility holding company, and parent of Georgia Power. In broad terms, the complaint alleges violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1–2) and Section 3 of the Clayton Act (15 U.S.C. § 14) involving a nationwide conspiracy among electric utility companies to eliminate gas as an energy source competitive with electricity. The real gist of the complaint, however, is more specific. Plain-

tiff is attacking as antitrust violations the following alleged acts or practices:

(a) Utilization of the demand for underground installation of electric distribution lines as an opportunity to foreclose Plaintiff as a competitor by exclusive dealings and tie-in contracts;

(b) The use of various allowances for the purpose of increasing economic pressures upon builders to accept free or reduced-cost underground installations in return for the exclusive use of electricity for all competitive energy purposes;

(c) The establishment of preferential rates and allowances; and

(d) The placing of restrictive covenants in deeds for the sale of land.

In their answers, the Defendants specifically denied the allegations of the complaint charging antitrust violations and set up the defense, pursuant to F.R.Civ.P. 12(b) (6), of failure to state a claim upon which relief may be granted. Presently before the Court for disposition is the joint motion for summary judgment filed in behalf of both Defendants on September 11, 1969. This motion is predicated upon two separate and distinct grounds:

(a) That interstate commerce is not sufficiently involved to give this Court jurisdiction under the federal antitrust laws; and

(b) That the conduct complained of by Plaintiff is excluded from the scope of the federal antitrust laws by reason of the regulation thereof by the State of Georgia, acting through the Georgia Public Service Commission.

Because of the Court's ruling with respect to the second ground of the motion, it is not necessary to treat or deal with the first ground. Therefore, in the opinion which follows, the first ground will be disregarded.

The facts upon which Defendants' motion is based are contained in a "Stipulation of Counsel" dated August 1, 1969 and filed prior to Defendants' motion. Before dealing with the facts in any greater detail, however, it should be pointed out that the Stipulation contains a clear and succinct itemization of the practices which Plaintiff is challenging as antitrust violations. To quote:

> "Plaintiff contends that pursuant to a national conspiracy between investor owned utility companies which are members of the Edison Electric Institute and in furtherance of a unilateral plan and program to suppress or eliminate competition between itself and the plaintiff, defendant Georgia Power, acting at the instance and request of, and/or ordered or authorized by its parent Southern, did the following acts:
>
> "(a) Adopted and implemented Rate Schedule B–10–B which plaintiff contends is preferential because the 'qualifying load' consists of usages in which natural gas is competitive with electricity; plaintiff further contends that said Rate Schedule permits defendant to sell electricity for such competitive uses at less than its incremental cost;
>
> "(b) Adopted and implemented an Underground Residential Distribution Wiring Plan which plaintiff contends constitutes a means by which Georgia Power 'bribes' general contractors to construct totally electric subdivisions and/or apartments;
>
> "(c) (Adopted and implemented a Residential Wiring Plan, Rule G, which plaintiff contends is another

means of 'bribing' builders to go 'totally electric' in single family residences and apartments;

"(d) Adopted and implemented Rate Schedule TE–2 which 'budget billing' plan, plaintiff contends, has been misrepresented and misinterpreted to constitute a guaranteed flat charge for electricity;

"(e) Used restrictive covenants in land deeds which covenants required that any building or dwelling erected on deeded property be 'total' electric."

With respect to these contentions, the parties agreed in the Stipulation that certain facts may be taken as true and correct for the purposes of this Court's ruling. As a general matter, the parties agreed that under Georgia law, regulation of the rates and services of public utilities, such as Defendant, Georgia Power Company, is vested in the Georgia Public Service Commission and agreed that Georgia Power Company is obligated by law to comply with orders of the Public Service Commission as to rates and services. The parties further agreed that all of the matters complained of by the Plaintiff, with the exception of the restrictive covenants, sub-paragraph (e) above, are subject to regulation by the Georgia Public Service Commission and that each of the challenged practices has been the subject of extensive hearings before the Public Service Commission upon complaints of Plaintiff, Atlanta Gas Light Company, and others. Finally, the parties agreed that in these hearings Plaintiff and Atlanta Gas Light Company offered a number of witnesses, including experts, and presented documentary evidence.

Further, the parties agreed to certain facts regarding each of the challenged practices enumerated above, which will now be outlined in some detail.

Georgia Power Company's Rate Schedule B–10–B is a general service rate, available to any customer who qualifies. It is used generally by commercial customers and has been in effect since 1933 with subsequent amendments, all pursuant to orders of the Georgia Public Service Commission.

Rate Schedule TE–2 is a rate for homeowners whose primary source of energy is electricity. It appears that this rate provides for budget billing, which means that the annual bill is estimated and paid in twelve equal installments, with an adjustment at the end of the year based on actual usage. This Rate Schedule was first used on January 1, 1965, pursuant to an order of the Georgia Public Service Commission.

Both B–10–B and TE–2 were the subject of an attack by Plaintiff and Atlanta Gas Light Company, another natural gas distributor, in extensive hearings before the Georgia Public Service Commission entitled:

> "In Re: Georgia Power Company, File Nos. 19314, 19367, 19462, Docket No. 2027–U (Re: Investigation of Rates, Promotional Practices and Allowances of Georgia Power Company, Atlanta Gas Light Company and Gas Light Company of Columbus)."

Public hearings commenced March 21, 1967 and continued through September 1, 1967. The record before the Commission comprised 1,623 pages of testimony and cross examination thereon and a very substantial number of exhibits. At the time the Stipulation was filed, the Public

Service Commission had not issued an order on that investigation. Subsequent to the filing of the Stipulation, but before oral argument on the present motion, an order was issued by the Commission, dated November 25, 1969, relating not only to B–10–B and TE–2, but to other challenged practices as well. More will be said about this order later.

With respect to Underground Residential Distribution, the Stipulation states that Defendant, Georgia Power Company, will provide underground systems of electrical connections for homes and apartments as an alternate to the usual overhead system, even though the cost of underground is in most cases in excess of the cost for overhead distribution facilities. Georgia Power Company filed with the Georgia Public Service Commission in 1967 its application for approval of its proposed plan for obtaining reimbursement of this excess in cost. Plaintiff and Atlanta Gas Light Company entered their objections to the proposed plan. Public hearings were thereafter held by the Commission on Georgia Power's plan, as well as on the objections filed by the gas companies. The Commission issued an order on June 28, 1968 (attached to the Stipulation as Exhibit C) disapproving and disallowing the plan submitted by the Georgia Power Company. In lieu of the proposed plan, the Commission devised a plan of its own and ordered the Power Company to follow it. This order states in part:

> "WHEREFORE IT IS ORDERED: That the plan submitted on November 14, 1967 by Georgia Power Company be and the same is hereby disallowed.

"ORDERED FURTHER: That Georgia Power Company shall obtain a contribution in aid-of-construction * * *

"ORDERED FURTHER: That Georgia Power Company will redeem the certificate held by the property owner * * *

"ORDERED FURTHER: That Georgia Power Company shall calculate the contribution in aid-of-construction * * * and file the same with the Commission for specific approval."

Subsequently, on motions for reconsideration, another order entitled "First Amendatory Order" was issued on November 18, 1968. This order is attached to the Stipulation as Exhibit D. The Commission again disallowed the original plan submitted by Georgia Power Company and "ordered" Georgia Power Company to adopt and comply with a plan substituted by the Commission. According to the Stipulation, Atlanta Gas Light Company is presently appealing these decisions of the Georgia Public Service Commission to the Superior Court of Fulton County, Georgia; but, for some reason, Plaintiff did not choose to exercise its right to a court review of the Commission's orders.

The Residential Wiring Plan of Defendant, Georgia Power Company, Rule G, is a plan inaugurated by Georgia Power Company on January 1, 1960, pursuant to an order of the Georgia Public Service Commission. In 1961, an attack was made upon this wiring plan and public hearings were held before the Georgia Public Service Commission. While neither Plaintiff nor Atlanta Gas Light Company were parties, officials of both companies

testified against the plan. The Commission upheld the plan by order dated August 29, 1961. In its four page decision, attached to the Stipulation as Exhibit E, the Commission found that the Residential Wiring Plan was "in the best interest of the general public and should, therefore, remain in effect." Whereupon, the Company was ordered to follow the plan as filed and in a subsequent order dated December 19, 1962 (attached to the Stipulation as Exhibit F), the plan was extended for another ten-year period.

The Stipulation contains information regarding the restrictive covenant attacked in sub-paragraph (e) of Plaintiff's contentions as set forth above. Subsequent to the filing of the Stipulation, the Supreme Court of Georgia rendered a decision invalidating this restrictive covenant on grounds of state law. Gas Light Company of Columbus v. Georgia Power Company, 225 Ga. 851, 171 S.E.2d 615 (1969). As already pointed out, no contention was made that this conveyance was subject to regulation by the Georgia Public Service Commission, and, since this decision is being confined to conduct that is so regulated, this will be discussed no further.

Reference has already been made to a decision of the Georgia Public Service Commission dated November 25, 1969, relating to Georgia Power's Rate Schedules B–10–B and TE–2, as well as to its Residential Wiring Plan. That order was quoted extensively during oral argument on the motion. In this order the Commission held that Rate Schedule TE–2 is "just, fair and equitable for the residential classes of service" and "ORDERED * * * that Rate Schedule TE–2, as presently authorized, be retained

in [its] present form." The Commission also found that the Residential Wiring Plan should "not be disturbed at this time" and "ORDERED FURTHER: That Georgia Power Company Residential Wiring Plan, as approved in Docket No. 1614–U which is now a part of the General Rules and Regulations for Electric Service, be retained and continued in force until January 1, 1973, at which time said Wiring Plan shall be terminated." Finally, the Commission held that Georgia Power Company's Rate Schedule B–10–B "is impractical in its application" and "ORDERED FURTHER: That Georgia Power Company General Service Rate Schedule B–10–B be revised" in a manner prescribed by the Commission.

It is interesting to note that in each of the Public Service Commission decisions referred to above there is a paragraph to the effect that "jurisdiction over this proceeding is expressly retained for the purpose of entering any further order or orders as this Commission may deem mete and proper." The Court construes this provision of each order as meaning that the Commission does expressly reserve jurisdiction in an attempt to insure the general public, as well as the competitors of Georgia Power Company, of the Commission's availability to review any of the plans at any time and to modify, alter or terminate any of the plans should the Commission determine that such action would be in the public interest.

Turning now to legal issues, the question for determination is whether the regulation, as set forth above, by the State of Georgia, acting through the Georgia Public Service Commission, of the practices under attack, is

sufficient to exclude them from the scope of the federal antitrust laws.

The principal case cited by Defendants in support of the affirmative of this proposition is Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, decided by the United States Supreme Court in 1943. In that case the State of California had set up administrative machinery to control the harvesting and marketing of agricultural commodities. Specifically, the case involved a proration plan for raisin growers and distributors which restricted competition among growers and maintained prices to packers. Directing itself to the attack made that the plan was in violation of the Sherman Act, the court assumed that the plan "would violate the Sherman Act if it were organized and made effective solely by virtue of a contract combination or conspiracy of private persons, individual or corporate." The Court held, however, that the Sherman Act does not apply to state approved action:

> "But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

"The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to 'persons' including corporations [§ 7], and it authorizes suits under it by persons and corporations [§ 15]. A state may maintain a suit for damages under it, Georgia v. Evans, 316 U.S. 159 [62 S.Ct. 972, 86 L.Ed. 1346], but the United States may not, United States v. Cooper Corp., 312 U.S. 600 [61 S.Ct. 742, 85 L.Ed. 1071]—conclusions derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the subject matter, the context and the legislative history of the statute.

"There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combination.' 21 Cong. Rec. 2562, 2457; see also at 2459, 2461. That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history." 317 U.S. at 350–351, 63 S.Ct. at 313.

Gas Light Company of Columbus attempts to distinguish *Parker* by characterizing the immunity as limited to conduct performed by agents of the state government at the specific command of the state legislature. In addition, Plaintiff contends that where, as here, there is any private action in the preparation or submission of plans for approval, *Parker* does not apply. Both of these arguments are without merit. As to the first, immunity was in fact accorded those private individuals in *Parker* who acted pursuant to the state's command. As to the second argu-

ment, the Supreme Court in *Parker* rejected the claim that the plan violated the Sherman Act because it required approval by a referendum of producers as well as the State Commission, and because the plan was initiated by request of a group of prominent producers, rather than the state. 317 U.S. at 352, 63 S.Ct. 307. Finally, Plaintiff quotes the following language from the Court's opinion in *Parker:*

> "A state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, Northern Securities Company v. United States, 193 U.S. 197, 332 [344–347, 24 S.Ct. 436, 454, 459–461, 48 L.Ed. 679] * * *." 317 U.S. at 351, 63 S.Ct. at 314.

In *Northern Securities* the contention was made that the defendant corporation was exempt from the antitrust laws because it had obtained a charter from the state and because its actions were within the charter authority. The Court summarily rejected this argument and held that simply because the state had issued a corporate charter, it could not immunize the chartered corporation from all federal statutory control. Applying the quoted language to the case at bar, just because an industry is regulated or because a regulatory scheme has been set up by the state, the antitrust laws will not automatically be disregarded. No contention has been made by Defendants that the antitrust laws are impliedly repealed as to their conduct just because Georgia Power Company is a regulated public utility. To the contrary, the Defendants are claiming that the specific practices which are being attacked are the result of legislative action by the state and thus within the *Parker* immunity. The Supreme Court of Georgia has said:

> "As we have previously noted, when the commission establishes a rate, such act is legislative in character, and binds all parties concerned in the same manner as if the rate had been fixed by an act of the General Assembly." Ga. Public Service Commission v. Atlanta Gas Light Company, 205 Ga. 863, 883, 55 S.E.2d 618, 630 (1949).

In other words, it is the conduct under attack for which immunity is being sought—not the corporate person of Georgia Power Company. Viewing the matter in this light, Plaintiff is really attacking the orders of the Georgia Public Service Commission

An examination of subsequent cases demonstrates a consistent pattern of the application of the *Parker* principle and indicates that the case is still viable. In 1966, the Fourth Circuit Court of Appeals, in Allstate Insurance Co. v. Lanier, 361 F.2d 870, gave consideration to an attack by several insurance companies upon a law of the State of North Carolina which required the companies to belong to a bureau of private persons which fixed rates and submitted them to the state for approval. The basis of the attack was that such a plan violated the Sherman Act. The District Court held, 242 F.Supp. 73 (1965), on the basis of Parker v. Brown, supra, that the activity in question was exempt because of the action of the state. The District Court found that the fact of the bureau being made up of private individuals, and not government officials, made no difference, since the bureau was answerable to the State Commission. On appeal, the Fourth Circuit stated:

> "The District Court's finding in the present case that the North Carolina Rating Bureau was operated under the active supervision of the state is not chal-

> lenged in this court, and we find no merit in the distinction suggested by appellants between the injunction sought in Parker v. Brown and the declaration of pre-emption sought here. The essential question in both cases is whether a program of regulations established and actively supervised by a state is subject to the antitrust laws. Absent congressional action departing from the rule of Parker v. Brown, the North Carolina statutory plan is clearly valid."

E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 1 Cir., 362 F.2d 52 (1966), is a similar restatement of the *Parker* doctrine. In that case, the defendant Port Authority had granted to one operator the right to operate an airport in Boston, and the plaintiff charged that the effect of this practice was to put him out of business. Again, it was held that:

> "What was done here was in the exercise of a valid governmental function. The antitrust laws are aimed at private action, not governmental action."

In Sun Valley Disposal Co., Inc. v. Silver State Disposal Co., 420 F.2d 341 (1969), the Court of Appeals for the Ninth Circuit affirmed the grant of a motion for summary judgment where a county commissioner, pursuant to state legislation, issued an exclusive franchise for garbage pickup to a competitor of the plaintiff. Granting that the arrangement would violate the Sherman Act if applicable, the Court held that the federal antitrust laws do not apply to exclusive arrangements made by local governments under the authority of state laws, even where they are anti-competitive. *Parker* was relied upon in Wainwright v. National Dairy Products Corp., 304 F.Supp. 567 (1969), decided by the District Court for the North-

ern District of Georgia. The Court held that the Milk Control Act of Georgia, to the extent that it fixed prices at which milk could be sold in Georgia, could immunize an alleged conspiracy under the federal antitrust laws to fix milk prices. In commenting on Parker v. Brown, the Court said:

> "We feel that the actions of the Georgia Milk Commission constituted state action, within the meaning of Parker v. Brown. See, also, Allstate Ins. Co. v. Lanier, 242 F.Supp. 73 (E.D.N.C. 1965), aff'd. 361 F.2d 870 (4th Cir. 1966), cert. denied, 385 U.S. 930, 87 S.Ct. 290, 17 L.Ed.2d 212. The Georgia Milk Commission functioned as a state agency within the Georgia Department of Agriculture. An elected state official, the Commissioner of Agriculture, appointed the chairman of the Milk Commission, fixed his compensation, and had dismissal power over him. Ga.Code § 42–525. The salary of the chairman was paid out of the general treasury of the State of Georgia. Under Ga.Code § 42–559, the chairman was charged with securing compliance with the Act. In addition to the chairman, a consumer member of the Commission was appointed to the board by an elected state official, the Governor, Section 42–525. After Gregory v. Hamilton, 215 Ga. 735, 113 S.E.2d 395 (1960), changed the method by which the Commission was financed, under Ga.Code § 42–548, all fees collected by the Commission were paid into the general fund of the state treasury and appropriations for its daily operations came from the General Assembly as part of the regular budget of the Department of Agriculture. The Act itself sets the maximum compensation members of the Commission could receive and provided the same travel and subsistence allowance for them as for other state officers and employees. Section 42–525.

> "Sanctions were afforded to enforce the provisions of the Act, e.g., §§ 42–544, 42–913, 42–532. Moreover, the General Assembly set strict standards to guide establishment of the Commission's price recommendations, § 42–554, full hearings were required for the revision of prices, and judicial review was provided. § 42–555.
>
> "In short, the state's hand ran throughout the statutory scheme: in the manner in which some of the Commission members were appointed, in the State Agriculture Commissioner's ultimate power over the chairman, who was the moving force in many of the Commission's actions, in placement of the Commission within the state bureaucracy, and in subjection of the agency to judicial review, to strict guidelines, and presumably, to duties imposed on other state agencies." 304 F.Supp. at 574.

Finally, *Parker, Wiggins* and *Sun Valley Disposal* were cited by Judge William B. Jones, of the District Court for the District of Columbia, in Hecht v. Pro-Football, Inc., 312 F.Supp. 472 (decided April 16, 1970), in sustaining the Defendant's motion for summary judgment in a Sherman Act complaint wherein it was charged that a long term lease of a football stadium was an unreasonable restraint on competition. Pointing out that legislation had created the lessor Board and had conferred upon it broad powers to construct and operate a stadium, the Court concluded that "the leasing of the stadium was pursuant to the mandate of the Act and was governmental action. * * * No violation of the [Sherman] Act can be made out even where there is a restraint upon trade or monopolization if it resulted from valid governmental action."

The Court is of the opinion that the principles of law set forth in the cases above, as applied to the specific facts of this case, demand the conclusion that the regulation by the State of Georgia, acting through the Georgia Public Service Commission, of the practices which have been challenged as antitrust violations, is sufficient to exclude these challenged practices from the scope of the federal antitrust laws, for the reasons hereinafter set forth.

The Constitution of the State of Georgia, Article IV, Section I, Paragraph I, provides:

> "The power and authority of regulating * * * charges of public utilities for their services, of preventing unjust discriminations, and requiring reasonable and just rates * * * and of charges of public utilities, are hereby conferred upon the General Assembly, whose duty it shall be to pass laws from time to time, to regulate such tariffs and charges, to prohibit unjust discriminations by the various * * * public utilities of this State, and to prohibit * * * public utilities from charging other than just and reasonable rates and to enforce the same by adequate penalties. * * *"

In addition, Article IV, Section IV, Paragraph III, of the Constitution states:

> "There shall be a Public Service Commission for the regulation of utilities, vested with the jurisdiction powers and duties now provided by law or that may hereafter be prescribed by the General Assembly, not inconsistent with other provisions of this Constitution. Such Commission shall consist of five members, who shall be elected by the people. A chairman shall be selected by the members of the Com-

> mission from its membership. * * * The qualifications, compensation, filling of vacancies, manner and time of election, power and duties of members of the Commission, including the chairman shall be such as are now or may hereafter be provided by the General Assembly."

Subsequently, the Georgia General Assembly enacted into law all those things contemplated by the preceding constitutional provisions. These laws created the Georgia Public Service Commission, prescribed the number of commissioners, their election and terms of office, their qualifications, the oath of office, the method of filling vacancies, the method of electing a chairman, and providing for his term of office and salary, and prescribed the salaries to be paid each commissioner, and required that such compensation be paid from the Treasury of the State of Georgia. Ga. Code, §§ 93–201 through 93–208. By § 93–304 the powers and duties conferred upon the Public Service Commission were extended to include gas and electric light and power companies. By § 93–307 the Public Service Commission was given general supervision of all utilities, including gas or electric light and power companies, and the Commission was given authority to require such utilities to establish and maintain such facilities as may be reasonable and just; to examine the affairs of such companies and to be informed as to their general condition and capitalization, their franchises and the manner in which their properties are managed, conducted, or operated. The Georgia Legislature further provided that "the power to determine what are just and reasonable rates and charges is vested exclusively in the

Public Service Commission." In Georgia Code §93–416, it is provided that should any utility subject to the supervision of the Georgia Public Service Commission fail, omit or neglect to obey, observe and comply with any order, direction or requirement of the Commission, it "shall forfeit to the State a sum of not more than $5,000 for each offense, the amount to be fixed by the presiding judge. Every violation of the provisions of this section or any other section, or of any such order, direction or requirement of the Public Service Commission shall be a separate and distinct offense, and in case of a continued violation, every day a violation thereof takes place shall be deemed a separate and distinct offense. * * *" Further, in § 93–417 of the Georgia Code it is provided that "the penalties prescribed by this Chapter and the procedure to enforce the same are made applicable to any and all violations of the rules, orders and regulations established by the Public Service Commission." Finally, the General Assembly has enacted legislation providing that every agent or employee of any public utility subject to the jurisdiction of the Georgia Commission who shall violate or procure, aid or abet any violation, or who shall fail to obey, observe or comply with any order of the Public Service Commission shall be guilty of a misdemeanor and shall be subject to prosecution in any county in which the company operates. Ga. Code, § 93–9901.

It is difficult to imagine a more comprehensive statutory scheme of regulation. Certainly, the hand of the state runs throughout every twist and turn of it. As already discussed in detail, each one of the challenged practices was the result of an order of the Georgia Public Service

Commission—regardless of how the practices might have been proposed or initiated and regardless of the manner in which Commission approval was sought—and in each instance the practices were the subject of further orders changing, modifying, altering, in some cases terminating, in some cases approving and in other cases disapproving, the plans as submitted or as carried out. In the case of Underground Residential Distribution, for example, the plans as submitted by Georgia Power Company were disallowed, and the Commission dictated the manner in which the rates and services would be provided. Therefore, it is clear that the practices in question in this case were not the product of individual agreement or combination. Rather, they were the product of a legislative command of the state. Clearly, they could not have become operative or effective without that command. For this Court to hold otherwise would place the Defendants on the classic "horns of a dilemma." Without *Parker* immunity, a public utility, such as Georgia Power Company, would be placed in the anomalous position of choosing between two conflicting laws—if the utility were to obey a Commission order it might thereby subject itself to treble damage liability under the antitrust laws; but if it chose not to obey the Commission order, relieving itself from antitrust liability, it would then be subject to criminal penalties under the laws of Georgia.

To apply the principles of antitrust law to activities of a regulated public utility which are carried out pursuant to an order of the state would be to defeat the very purpose of state regulation. The effect, in short, would be to render the activities of state regulatory

agencies nugatory. The Court is of the opinion that Congress, in enacting the Sherman Act, recognized this difficulty and drafted the act in such a manner so as to apply only to private individuals and entities. This is what is recognized in Parker v. Brown; and this is what should control the case at bar.

The other arguments made by Plaintiff do not affect this result. Plaintiff relies on a number of antitrust cases dealing with federal agencies.[1] Those cases all concern the relationship between federal agencies and the federal courts in matters of antitrust enforcement, and the decision in each one is based upon a conclusion as to the manner in which Congress has chosen to delegate responsibility for antitrust enforcement between the agencies and the courts. Therefore, such cases do not apply here. In addition, Plaintiff cites the recent decision of Judge Oren R. Lewis, of the Eastern District of Virginia, in Washington Gas Light Company v. Virginia Electric and Power Co., 309 F.Supp. 1119 (decided January 30, 1970). In that case, Judge Lewis held that an Underground Residential Distribution Plan being used by Virginia Electric and Power Company violated Section 1 of the Sherman Act and Section 3 of the Clayton Act. The Court found that the plan amounted to an illegal tying arrangement and that, as such, it was a *per se* violation of the antitrust laws. The curious thing about the opinion is the Court's assumption that underground residential

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[1]Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 86 S.Ct. 781, 15 L.Ed.2d 709 (1966); United States v. Radio Corp of America, 358 U.S. 334, 79 S.Ct. 457, 3 L.Ed.2d 354 (1959); California v. F. P. C. 369 U.S. 482, 82 S.Ct. 901, 8 L.Ed.2d 54 (1962); United States v. Philadelphia National Bank, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963); and others.

distribution and electricity are two separate products, so that one can be tied to the other as computer cards were tied to IBM machines in International Business Machines Corp. v. United States, 298 U.S. 131, 56 S.Ct. 701, 80 L.Ed. 1085 (1936). To my mind, Underground Residential Distribution is merely a method by which a product —electricity—is delivered to the consumer. It might be compared to a department store's delivery of merchandise bought by a customer living fifteen miles out in the country—if that customer bought a single necktie it is doubtful the store would treat the delivery the same way it would if the customer bought a wardrobe. Underground Residential Distribution is ancillary to both the seller and buyer of the product, in much the same way as a free meal given to an airline passenger is ancillary to the sale of an airline ticket. Therefore, it is difficult to see how there could be a separate tying product in the commercial sense, or how such a case could be fit within the tying clause concept.[2] At any rate, a careful reading of Judge Lewis' decision shows that no serious claim of state action was ever made in the *Washington Gas Light* case to the effect that the Virginia State Corporation Commission had approved and ordered into effect the Underground Wiring Plan contested in that case. Thus, the decision of the Virginia court, while interesting, sheds no light on the issue which is now before this Court and is really irrelevant.

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[2]For a very interesting discussion of this problem, see the article by Donald I. Baker, Chief, Evaluation Section, Department of Justice, entitled "Another Look at Franchise Tie-Ins After Texaco and Fortner." The Antitrust Bulletin, Volume XIV, Winter, 1969, page 767.

For the reasons stated above, the motion for summary judgment in behalf of Defendants, Georgia Power Company and The Southern Company, is hereby sustained with respect to each of Plaintiff's contentions as set forth in the Stipulation of Counsel, with the exception of the restrictive covenant referred to in sub-paragraph 2(e) thereof.

Appendix B

In the United States of Appeals
for the Fifth Circuit

No. 30091

Gas Light Company of Columbus,
Plaintiff-Appellant,

vs.

Georgia Power Company and
The Southern Company,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(March 23, 1971)

Before BELL, DYER, and RONEY, Circuit Judges.

BELL, Circuit Judge: This appeal presents an important question in drawing the balance between state action excluded from the federal antitrust laws under the aegis of *Parker v. Brown,* 1943, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed 315, on the one hand, and includible non-state action activity on the other, in the field of state regulated public utility monopolies. The case comes to us on an appeal by plaintiff from a summary judgment entered for defendants on a stipulation of facts which is full and complete for the purposes of the issue presented. We affirm.

Plaintiff, Gas Light Company of Columbus, is the sole distributor of natural gas in the Columbus, Georgia area. Its rates and services are regulated by the Georgia Public Service Commission. The defendants are Georgia Power Company, an electric utility engaged in the sale of electricity in the Columbus area and in most of Georgia. It also is a Georgia Public Service Commission regulated monopoly, being the sole supplier of electricity in its territory of operation. The parent corporation of Georgia Power Company, the Southern Company, is likewise a defendant. Others are charged as co-conspirators but are not named as parties defendant. The complaint alleged violations of §§ 1 and 2 of the Sherman Act, 15 USCA, §§ 1 and 2, and 3 of the Clayton Act, 15 USCA, § 14.[1] The violation is said to arise from a nationwide

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[1] 15 USCA, § 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . ."

15 USCA, § 2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, . . ."

15 USCA, § 14:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding

conspiracy among electric utilities to eliminate natural gas as a competitive energy source. Treble damages and injunctive relief are sought.

I.

The claimed conspiracy rested on specified acts and practices charged to Georgia Power and allegedly ordered by the Southern Company. In considering these acts and practices, we must have in mind that gas is not competitive with electricity in certain aspects such as in lighting generally, and in the operation of small household appliances and the like. Gas is competitive with electricity for use in operating furnaces and space heaters, air conditioners, water heaters, stoves, refrigerators and clothes driers. There is vigorous competition between the electric and gas industry for this latter type of business.

There are five acts and practices charged as a basis for the antitrust violations. One of these was not considered in the district court and will not be considered here except to state that it charged Georgia Power with placing a restrictive convenant, requiring all-electric building use, in a deed conveying 30 acres of land. This restrictive covenant was later held invalid by the Supreme Court of Georgia. *Gas Light Company of Columbus v. Georgia Power Company,* 1969, 225 Ga. 851, 171 S.E.2d 615. At any rate, this claim still resides in the district court. The summary judgment which forms the subject matter of this appeal, taken pursuant to Rule 54(b), F.R.Civ.P., and 28 USCA, § 1291, eliminated each of the other acts and practices from the case as bases

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may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

for recovery. Each involved rate and service matters which had been considered by the Georgia Public Service Commission in due course.

These acts and practices are as follows:

Rate Schedule B-10-B

This is a general service rate in effect since 1933 with subsequent amendments. The charge reduces as the load increases. Plaintiff urges that this rate schedule is preferential because the increased usage to obtain decreased rates involves usages which compete with gas. This argument rests on the idea that the captive market for electricity (lighting, small appliances) requires only low usage and thus the decreased rates apply to those high use areas where gas and electricity compete. Plaintiff also claims that the rate permits Georgia Power to sell electricity at less than its incremental costs.

Rate Schedule TE-2

This is a budget billing plan for homeowners whose primary source of energy is electricity and whereunder the annual electric bill is estimated and divided into twelve equal installments with an adjustment at the end of the year based on actual usage. This schedule has been in effect since 1965 pursuant to an order of the Commission. Plaintiff claims that this rate schedule is misrepresented to constitute a guaranteed flat charge for electricity.

Underground Residential Distribution Wiring Plan

This rate came about in 1967 by reason of the Federal Housing Authority requiring underground wiring in new

subdivisions. Plaintiff contends that Georgia Power uses it to bribe contractors to construct totally electric subdivisions and apartments. This stipulation demonstrates that Georgia Power requires the contractor to pay a part of the cost of underground wiring. It can be argued, however, that the effect is that Georgia Power pays a part of the cost since each pays a part and Georgia Power pays more if electric heat is to be used. The plan offered by Georgia Power was rejected by the Commission which then promulgated its own underground wiring distribution plan and charge.

Residential Wiring Plan, Rule G

This again is a rate schedule which plaintiff contends was adopted for use in bribing builders to go totally electric in home and apartment construction. This schedule was implemented in 1961 pursuant to an order of the Commission but was revised by the Commission in 1962 after hearings. Under it Georgia Power makes a promotional payment of $50.00 to $180.00 per unit if residences or apartments are wired for electric range and electric water heater, dryer or space heating.

Each of these acts and practices are rate schedules and each has been considered by the Georgia Public Service Commission in an adversary proceeding. Each is effective by order of the Commission. In addition, B-10-B, TE-2 and Rule G were the subject matter of further extensive hearings on the complaint of plaintiff and Atlanta Gas Light Company beginning in 1967 with the result of a further order of the Commission relative to each being entered in 1969. TE-2 and Rule G were left in effect but Georgia Power was ordered to revise B-10-B

in a manner prescribed by the Commission. Moreover, the Commission retains jurisdiction with respect to each of the rate schedules for entering such other and further orders as the Commission may deem proper.

II.

The question presented is whether the court below erred in holding that these rate schedules were the products of state action, i.e., products of the Georgia Public Service Commission, and as such, excluded from the proscription of the federal antitrust laws under the teaching of *Parker v. Brown,* supra.

We turn then to *Parker v. Brown* which is the benchmark in the consideration of the issue presented. As will be seen, a frame of reference is established by it and some of the decisions which have followed it.

In *Parker v. Brown,* a raisin producer brought an action to enjoin a state official and other state agents from enforcing a California raisin marketing prorate program instituted pursuant to a California statute. The intent of the program was to supplant chaotic competition between farmers with centralized marketing plans. The statute set up an agricultural advisory commission, composed of state officers, which was empowered to authorize creation of a prorate plan and appoint a committee upon the petition of raisin producers. The committee was authorized to administer the program, subject to supervision by the commission.

As adopted, the raisin program was designed to regulate the harvesting and marketing of raisins in California, and the price at which the various grades of raisins

would be sold by producers to packers. Plaintiff attacked the program under §§ 1 and 2 of the Sherman Act. The Supreme Court assumed that the plan "would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination of conspiracy of private persons, individual or corporate." 317 U.S. at 350. The court stated, however, that the Sherman Act is not directed at restraining acts of the state as directed by its legislature. While conceding that the plan had many private characteristics, the court concluded in holding for the defendants that "it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the exercise of a governmental policy." 317 U.S. at 352.

Although the Supreme Court has not decided subsequently a case similar on its facts, the continuing vitality of the *Parker* exclusionary rationale is demonstrated by the decisions of the court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 1961, 365 U.S. 127, 5 L.Ed.2d 464, 81 S.Ct. 523, and in *United Mine Workers v. Pennington,* 1965, 381 U.S. 657, 14 L.Ed.2d 626, 85 S.Ct. 1585. In these cases the court held that joint efforts to influence public officials in the passage of laws were not within the scope of the antitrust laws. Meanwhile there have been several federal decisions which explicate the *Parker v. Brown* holding in varying factual contexts and which bear on the issue before us.

In *Allstate Ins. Co. v. Lanier,* 4 Cir., 1966, 361 F.2d 870, the court affirmed the dismissal by the district court of an antitrust action brought to enjoin the North Carolina system of regulating automobile insurance rates. The state maintained a system under which uniform rates and

standards were promulgated at the initiative of a rating bureau, composed of the insurance companies, subject to approval by the Commissioner of Insurance. In holding that *Parker* immunity applied, the court said that North Carolina's program qualified as a product of state action because it was "under the active supervision of the state", even though the rates were of private origin. 361 F.2d at 872. See also *E. W. Wiggins Airways, Inc. v. Mass. Port Authority,* 1 Cir., 1966, 362 F.2d 52.

The other side of the coin may be seen in *Asheville Tobacco Board of Trade v. Federal Trade Commission,* 4 Cir., 1959, 263 F.2d 502. There the facts were that a North Carolina statute authorized the creation of local Tobacco Boards of Trade for the purpose of making rules and regulations relative to handling the sale of tobacco at auction. The Boards of Trade made their own rules and regulations and operated without regulation or supervision by the state. Although remanding the case to the Federal Trade Commission for reconsideration of other questions, the court concluded that the activity on the part of the defendant Board of allocating selling time in tobacco warehouses was not precluded from antitrust regulation by *Parker v. Brown.* The distinction was that the activity was individual or private on the part of the Board as distinguished from state action.

In *Woods Exploration & Producing, Inc. v. Aluminum Co. of America,* 5 Cir. 1971, ___ F.2d ___ [slip opinion dated January 5, 1971, Nos. 28,763 and 29,487], we refuse to characterize as state action the regulation of production of natural gas by the Texas Railroad Commission, since plaintiffs alleged that defendants filed false information with the Commission. We held that such

"actions taken to subvert the Commission scheme for anticompetitive purposes are subject to the strictures of the antitrust laws." Supra at 37. Such fraudulent conduct by regulated companies did not fall under the cloak of the state action concept of *Parker v. Brown.*[2] Unlike the situation in *Woods Exploration,* here we have no claim that the Georgia Power filed false information with the Commission or otherwise engaged in fraudulent conduct.

And, unlike the situation in *George R. Whitten, Jr. v. Paddock Pool Builders, Inc.,* 1 Cir. 1970, 424 F.2d 25, we deal with state regulated monopolies and not with an activity wherein the state required competitive bidding. In *Whitten,* the conduct which formed the basis of the antitrust complaint had to do with the adoption by public officials of defendant Paddock's specifications for swimming pools and related equipment thereby excluding competitors in a market where competitive bidding was required. The court found this conduct to be outside the *Parker* exclusion.

This brings us to *Washington Gas Light Co. v. Virginia Electric & Power Co.,* 4 Cir., ___ F.2. ___ [slip opinion dated February 12, 1971, No. 14,605], a case somewhat similar to our own. There plaintiff attacked defendant VEPCO's "underground residential distribution" practice or service, a service much like Georgia Power's here, as a violation of the antitrust laws. The

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[2]The factual situation in *Trucking Unlimited v. California Motor Transport Co.,* 9 Cir., 1970, ___ F.2d ___ [slip opinion dated October 5, 1970, No. 22,462], is akin to the fraudulent information aspect of *Woods Exploration* in that the gist of the anticompetitive conduct there charged was an abuse of the processes of the regulatory commission and courts in contesting the certificate applications of competitors.

district court agreed, holding that the practice was a per se violation of the Sherman Act as an illegal tying arrangement, and also a violation of the Clayton Act as an exclusive dealing arrangement. The district court did not consider the question of the practice being excluded from the reach of the antitrust laws by *Parker*. The Fourth Circuit reversed, holding the *Parker* exemption applicable although the State Corporation Commission made no investigation and gave no approval to the VEPCO practice in question. The court preferred to infer that silence meant approval of the plans, and that there was therefore state action. Stressing that the Commission "possessed adequate regulatory powers to stop the power company if it chose to do so", supra at 10, the court concluded:

> "We think VEPCO's promotional practices were at all times within the ambit of regulation and under the control of SCC, and we hold these practices exempt from the application of the laws of antitrust under the *Parker* doctrine." Supra at 10.

In the instant case, it is unquestioned that the Georgia Public Service Commission has the power to regulate the rates and practices of public utilities in Georgia. Ga. Const., Art. IV, § I, ¶ I; Art. IV, § IV, ¶ III. See Ga. Code Ann. §§ 93-304, 307 and 309. Here, as stated, the Commission has been anything but silent concerning these practices of Georgia Power; thus under the *Washington Gas Light* holding, the *Parker* exclusion would apply in the instant case.

However, it is not necessary for us to extend the *Parker* exclusion to the point of its extension in *Washington Gas Light* and we do not do so. As we have seen

above, the Commission here gave lengthy consideration to each of the practices and rates under attack, and after full adversary hearings ordered them into effect, some with major modifications. Defendant's conduct cannot be characterized as individual action when we consider the state's intimate involvement with the rate-making process. Though the rates and practices orginated with the regulated utility, Georgia Power, the facts make it plain that they emerged from the Commission as products of the Commission. They are thus immune from the operation of the antitrust laws under the *Parker* exemption.

It is to be added that as products of the Commission they are state activity as distinguished from mere private action subject to the antrust regulation under the admonition of the court in *Parker* that ". . . a state does not give immunity to those who violate the Sherman Act . . . by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351.[3]

Our view is that the *Parker* exclusion applies to the rates and practices of public utility enjoying monopoly status under state policy when their rates and practices are subjected to meaningful regulation and supervision by the state to the end that they are the result of the considered judgment of the state regulatory authority; here the Georgia Public Service Commission. Here the regulatory judgment was entered after notice and adversary proceedings.

AFFIRMED.

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[3]On the inapplicability of the *Parker v. Brown* state action exclusionary principle in federally regulated activities, see *United States v. Philadelphia National Bank*, 1963, 374 U.S. 321, 10 L.Ed.2d 915, 83 S.Ct. 1715.